ORIGINAL

Supreme Court, U.S.
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NO. 89 - 189

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JAMES R. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent, Arizona State Prison,

Petitioners,

- vs -

JIMMIE WAYNE JEFFERS,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, JIMMIE WAYNE JEFFERS, asks leave to file the accompanying Response to Petition For Writ Of Certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed before the United States Court of Appeals for the Ninth Circuit. Respondent's affidavit in support of this motion is attached hereto.

DATED this 30th day of August, 1989.

Law Offices
PIMA COUNTY PUBLIC DEFENDER

Donald S. Klein
DONALD S. KLEIN

FRANK P. LETO
ATTORNEYS FOR RESPONDENT

32 N. Stone, Fourth Floor
Tucson, Arizona 85701
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19 pp

IN FORMA PAUPERIS AFFIDAVIT

SUPREME COURT OF THE UNITED STATES
(Insert appropriate court)

JAMES R. RICKETTS, et seq.,
(Petitioner)

v.

JIMMIE WAYNE JEFFERS,
(Respondent (s)).

AFFIDAVIT IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

I, JIMMIE WAYNE JEFFERS, am the petitioner in the above entitled case. In support of my motion to proceed without being required to prepay fees or costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I declare that the responses which I have made below are true.

1. Are you presently employed? Yes ( ) No (X)
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____
   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received. 1978 $500 mo

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes ( ) No (X)
   b. Rent payments, interest or dividends? Yes ( ) No ( )
   c. Pensions, annuities or life insurance payments? Yes ( ) No (X)
   d. Gifts or inheritances? Yes ( ) No (X)
   e. Any other sources? Yes (X) No ( )

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. Parents send money for stamps.

3. Do you own cash, or do you have money in a checking or savings account?

   Yes (X) No ( ) (Include any funds in prison accounts.)

   If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes ( ) No (X)

   If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute to their support NONE

I understand that a false statement or answer to any questions in this declaration will subject me to penalties for perjury.

Jimmie W. Jeffers
(Signature)

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 6th day of Aug 1985.

Jimmie W. Jeffers
(Petitioner's Signature)

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $19.27 on account to his credit at the ASPC-F (on 8-14-85) institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution:

Carl Scott CO II
Authorized Officer of Institution

NO. 89 - 1x9

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES G. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent of the Arizona State Prison,

Petitioners,

v.

JIMMIE WAYNE JEFFERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN A. KETTLEWELL,
Pima County Public Defender

*DONALD S. KLEIN
FRANK P. LETO

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ATTORNEYS FOR RESPONDENT
*Counsel of Record

QUESTION PRESENTED

1. May a federal court independently determine whether a State's application of its "especially heinous ... or depraved" aggravating circumstance to a capital defendant violates the Eighth Amendment principles of Godfrey v. Georgia, 446 U.S. 420 (1980)?

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NO. 89 - 189

IN THE

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OCTOBER TERM 1989

JAMES G. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent of the Arizona State Prison,

Petitioners,

v.

JIMMIE WAYNE JEFFERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Jimmie Wayne Jeffers, respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the decision of the Ninth Circuit Court of Appeals entered in this case on November 9, 1987.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 832 F.2d 476 (1987). (See also, Petitioner's Appendix A).

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment in this case on November 9, 1987. Request for rehearing and suggestion for a rehearing en banc was denied by order dated April 14, 1989. On August 8, 1989, Respondent was granted to and including August 30, 1989 to file his response to the Petition for Writ of Certiorari. The statutory provision relied on by the Petitioner to invoke jurisdiction is 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution Amendment XIV: No State shall ... deprive any person of life, liberty, or property, without due process of law ... .

REASONS FOR DENYING WRIT

I. THE DECISION OF THE COURT BELOW WAS A STRAIGHT FORWARD APPLICATION OF GODFREY V. GEORGIA.

Nothing about the Court of Appeals' decision below calls for review on certiorari by this Court.

The focus of the panel's decision was the uniquely broad language of the Arizona statutory aggravating circumstance "especially heinous ... or depraved."[1] Jeffers v. Ricketts, 832 F.2d 476, 482 (9th Cir. 1987). That was the only aggravating factor found in this case. The panel's decision did not involve the aggravating circumstance "cruelty." The Arizona Supreme Court explicitly held that the circumstances of the case did not establish "cruelty." State v. Jeffers, 135 Ariz. 404, 429, 621 P.2d 1105 (1983).[2] The panel examined previous Arizona decisions in light of Godfrey v. Georgia, 446 U.S. 420 (1980) and concluded that the "especially heinous ... or depraved"[3] aggravating circumstance was not constitutionally applied to Respondent

---

[1] See, Arizona Rev.Stat. 13-703(F)(6)

> "F. Aggravating circumstances to be considered shall be the following: ... 6. The defendant committed the offense in an especially heinous, cruel or depraved manner."

[2] Since the Arizona Supreme Court held that the killing was not "cruel", those Arizona cases concerned with the concept of "cruelty" - such as Adamson v. Ricketts, 865 F.2d 1011, 1016 (9th Cir. 1988) cert. pending. - do not control the disposition of this case. Rather, the instant case is limited to that subcategory of cases involving the more subjective and amorphous statutory terms "heinous or d praved." Jeffers v. Ricketts, supra, 832 F.2d at 483.

[3] The Arizona statute is written in the disjunctive. This gives rise to an additional constitutional problem because a disjunctive statute may prevent a properly narrow construction. Godfrey v. Georgia, 446 U.S. at 454 (White, J. dissenting) (aggravating circumstance in disjunctive "would arguably be assailable on constitutional grounds").

Jeffers. 832 F.2d at 483-4.

The Godfrey analysis applied by the panel has since been approved and reaffirmed by this Court in Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The analysis of the panel establishes nothing in the way of federal law that Maynard did not establish only over one year ago. id. 100 L.Ed.2d at 381. The analysis of the panel is that kind of analysis of state law this Court usually leaves to the respective courts of appeals. id. 100 L.Ed.2d at 379-380. Consequently, the analysis and holding of the panel in this case presents no occasion for this Court's review, the panel did not misapply Godfrey, and the State's Petition for Certiorari should be denied.

Petitioner claims that this case presents the question of the appropriate federal standard courts should apply in reviewing state court findings of aggravating circumstances and that the decision of the panel did not properly defer to the state court's assessment of the facts (Petition, pp. 10-11). The panel properly deferred to and applied the historical facts as found by the Arizona Supreme Court. Compare, Jeffers v. Ricketts, 832 F.2d at 478, 484-5, with, State v. Jeffers, 135 Ariz. at 412, 429-30. As to the appropriate standard of review applicable to aggravating circumstances, the panel was aware of and applied the standard from McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) that a constitutional violation only arises when the "capital punishment system operates in an arbitrary and capricious manner ... ." Jeffers, 832 F.2d at 485-6. In this case, the panel concluded that the death penalty was imposed against Jeffers in an "arbitrary and capricious manner." 832 F.2d at 486. Thus, Petitioner is mistaken when it claims that this case raises a significant question concerning the appropriate standard to be applied in the federal courts and that the panel did not defer to the state court's findings of fact.

Petitioner also claims there is a conflict within the Circuits over the appropriate standard for reviewing aggravating

circumstances. Petitioner cites Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986) to illustrate the seeming conflict that exists within the Circuits. Examination reveals that no such conflict exists. In Magwood, supra, the Court of Appeals affirmed the District Court's granting of the defendant's writ of habeas corpus on the ground that the state court erroneously rejected two mitigating circumstances during sentencing. 791 F.2d at 1440. In upholding the District Court's decision, the Court of Appeals held that it would not re-evaluate the weight given to a particular aggravating or mitigating circumstance, but that it would re-evaluate the existence of a particular aggravating or mitigating circumstance. 791 F.2d at 1449. Moreover, unlike the instant case, the Magwood court was not faced with a Godfrey v. Georgia/Maynard v. Cartwright attack on a particular aggravating circumstance and the court said nothing about the standard of review applicable to such an attack. id. 791 F.2d at 1447-50. Consequently, the panel's decision in the instant case does not conflict with the Eleventh Circuit's decision in Magwood and Petitioner's claim is unpersuasive.

To illustrate that a seeming conflict exists within the Ninth Circuit, Petitioner cites Woratzeck v. Ricketts, 820 F.2d 1450 (9th Cir. 1987) cert granted, 108 S.Ct. 2815 (1988). The decision in Woratzeck has been vacated by the Court of Appeals and remanded to the District Court following an order from this Court "for further consideration in light of Maynard v. Cartwright ... ." See Woratzeck v. Ricketts, 859 F.2d 1359 (9th Cir. 1988). The panel in the instant case applied a Maynard type analysis to the circumstances of the case and, consequently, there is no conflict within the Ninth Circuit on this point.

Petitioner next complains that the panel decision incorrectly applied Arizona law when it surveyed prior Arizona decisions which defined and applied the "especially heinous or depraved" aggravating circumstance. The analysis employed by the panel was similar to that employed by the Tenth Circuit in Cartwright v. Maynard, 822 F.2d 1477, 1487-8 (10th Cir. 1987) and

approved by this Court in Maynard v. Cartwright, supra, 100 L.Ed.2d at 379. Consequently, Petitioner's complaint about the panel's analysis is not well taken.

Petitioner also complains that certain differences between other Arizona cases and Respondent's case somehow establish that Respondent's conduct was especially heinous or depraved. There are two defects with Petitioner's complaint. First, the "differences" mentioned by Petitioner in no way meaningfully distinguish Respondent's case from those cases where the aggravating circumstance in question was not found. Second, Petitioner has selected only a small number of cases to illustrate its complaint; of equal significance are numerous cases Petitioner omits from its examination.

The killings mentioned by Petitioner which were not found "heinous" or "depraved" well illustrate the unpredictable application of this statute:

In State v. R.D. Smith, 138 Ariz. 673 P.2d 17 (1983), the victim was repeatedly raped by Smith prior to her murder. She was then choked, stabbed, her throat cut, and her head crushed with a rock. id. 673 P.2d at 22. Smith requested playing the song "We Are The Champions." 673 P.2d at 23-4. Petitioner argues the evidence of Smith's heinous or depraved attitude was "equivocal" because the source was an accomplice. Yet, in Respondent's case, the source of evidence against him was the testimony of Doris Vanderveer, who testified under a grant of immunity. Jeffers, 832 F.2d at 479, 484, fn. 4. That the source of evidence against a capital defendant comes from an accomplice rather than an immunized witness has nothing to do with the definition of "heinous or depraved."

In State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983), the defendant obtained a rifle and fired two shots at the victim as he answered his front door. In describing the killing to his friends, Graham "smiled as he told them the victim 'squealed like a rabbit' when he was shot." 660 P.2d at 463. Petitioner points to the fact that the defendant in Graham presented mitigating

evidence as to his mental condition; but that makes no difference with respect to the application of the "heinous or depraved" aggravating circumstance.

In State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979), the victim was shot in the back with a .38 caliber revolver. The victim fell to the floor and complained "it hurts." The defendant then said "don't worry, buddy, it will be okay" and shot the victim again in the back. The victim's body was taken to a parking lot at the airport and abandoned. 124 Ariz. at 40. Petitioner emphasizes that the defendant in Brookover shot the victim twice in relatively quick succession; but that does not meaningfully distinguish that case from the instant case where Cheney was rendered unconscious with an overdose of drugs and did not suffer. See Jeffers, 135 Ariz. at 429.

In State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980), the defendant murdered a husband and wife during a drug robbery. Prior to the killing, the defendant bragged that he was going to "rub out a dude" and "rip him off." 612 P.2d at 495. The defendant shot the wife seven times, at least four times in the head and twice in the chest. The defendant shot the husband four times, twice at close range. The husband was kicked in the face after losing consciousness. 612 P.2d at 493. How Respondent's conduct showed an especially heinous or depraved determination to kill, but Ceja's did not, is impossible to fathom.

In State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), the defendant and codefendant entered the victim's home in order to commit a burglary. When the defendant went upstairs, the victim obtained a gun and shot at the codefendant. The defendant came down stairs and shot the victim in the back four times, the last time while the victim was lying face down on the floor. Petitioner points out that defendant Watson sought out and shot the victim during a residential burglary in order to aid his codefendant's escape; but that does nothing to establish the definition of the "heinous or depraved" aggravating circumstance in the instant case.

In State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985), the defendants disguised themselves as police officers and robbed a Purolator van of more than $300,000.00. Two Purolator guards were placed in canvas bags containing rocks and dumped in Lake Mead. One guard died by drowning and the other by either drowning or a heart attack. The bodies were in the water at least two weeks and found three-four weeks later. 144 Ariz. at 393. That the state of mind of the defendants in Poland could not be established because no witness survived to show how the victims were killed and dumped into the lake is irrelevant to the definition of the aggravating circumstance applied in the instant case.

To determine whether the Arizona Supreme Court has constitutionally applied the "especially heinous or depraved" aggravating circumstance, the list of cases examined could - but need not - stop there. A broader examination of Arizona case law reveals that "the list of considerations ... the Arizona Supreme Court has been willing to use to support one of the three terms that comprise its especially heinous aggravating factor is extremely broad." Rosen, The Especially Heinous Aggravating Circumstance in Capital Cases - the Standardless Standard, 64 N.C.L. Rev. 941, 981 (1986). "Whenever anything about a murder has proved offensive to the court, ... it has approved [this factor]." Rosen, 64 N.C.L. Rev. at 981 (emphasis in original). For example, in a number of cases the aggravating circumstance "especially heinous or depraved" was either not found or such finding was reversed, even though the cases involved "apparent relishing" of the murder,[4] gratuitous violence,[5] and/or

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[4] State v. Madsen, 125 Ariz. 342, 609 P.2d 1046 (1980) (defendant practiced crying to fake grief and bragged that it was "easy" to kill someone for insurance money); State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982) (defendant wrote "the bitch" in the dirt near the victim's body); State v. Watkins, 133 Ariz. 1, 648 P.2d 116 (1982) (when police arrived, defendant told them the victim "must have been very sick, he's throwing up blood"); State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984) (defendant bragged that he "left no witnesses" after killing two individuals).

"needless" mutilation.[6] Similarly, the "mere existence of the ... helplessness of the victim, in isolation, does not always lead to a holding that the crime is heinous" see State v. Gretzler, 135 Ariz. 42, 52-3, 659 P.2d 1, 11-12 (1983), but in several cases it has.[7] A fuller review of this broader list of factors and cases reveals that Petitioner has not fully confronted the inconsistent application of the "especially heinous or depraved" aggravating circumstance. The panel's analysis - consistent with both Godfrey and Maynard - establishes that fact. But its holding is properly narrow: it only concludes that the aggravating circumstance in question has been unconstitutionally applied to Respondent in this case. Jeffers, 832 F.2d at 485-6.

In sum, Petitioner's claim that the panel misapplied Arizona case law in unpersuasive because, as the panel pointed out, there is no meaningful way to distinguish Jeffer's case in which the aggravating circumstance of especially heinous or depraved was found from those cases in which it was not. 832 F.2d at 486. That Petitioner can conjure up facts to distinguish the instant

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[5]State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981) (victim strangled, beaten, lacerated "over the entire body", and had a ligature tied around her neck); State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979) (victim shot five times); State v. Cookus, 115 Ariz. 99, 563 P.2d 898 (1977) (victim beaten with rocks, then shot six times); State v. Billhymer, 114 Ariz. 390, 561 P.2d 311 (1977) (nude, bound victims repeatedly stabbed); State v. Encinas, 132 Ariz. 493, 647 P.2d 624 (1982) (victim beaten, run over with car, stabbed 30 times); State v. Thomas, 133 Ariz. 533, 652 P.2d 1380 (1982) (victim stabbed twice and throat cut).

[6]State v. Williams, 133 Ariz. 220, 650 P.2d 1202 (1982) (victim killed by a stab wound in the temple, had lacerations on her throat and forehead); State v. Christensen, supra, 129 Ariz. 32 (victim strangled and beaten); State v. Purcell, 117 Ariz. 305, 572 P.2d 439 (1977) (victim beaten with butt of shotgun, then repeatedly shot in chest).

[7]Cases involving apparent "senselessness" or "helplessness" where no finding of heinousness include: State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985) (70 year old burglary victim bound and beaten, died of smoke inhalation); State v. Blazak, 131 Ariz. 598, 643 P.2d 694 (1982) (murder of innocent bystander to robbery); State v. Arias, 131 Ariz. 441, 641 P.2d 1285 (1982) (81 year old woman bound, gagged, and strangled during burglary); State v. Luian, 124 Ariz. 365, 604 P.2d 629 (1979) (unconscious robbery victim stabbed to death); State v. Garcia, 133 Ariz. 522, 652 P.2d 1045 (1982) (victim repeatedly beaten over the head with a pipe during robbery).

case from other cases[8] does not undermine the panel's analysis. The conclusion of the panel - supported by Godfrey and Maynard - is that the aggravating circumstance of especially heinous or depraved was not constitutionally applied to Respondent under the circumstances of his case. This decision is not in need of review by this Court.

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[8]As shown by examination of the cases cited by Petitioner, many of Petitioner's distinctions concern mitigating and/or evidentiary issues wholly separate from the facts the Arizona Supreme Court has said are relevant to the "especially heinous or depraved" aggravating circumstance. Thus, the distinctions are not meaningful to determine the existence of the aggravating circumstance in questions.

CONCLUSION

The decision below was a correct application of Godfrey v. Georgia (as approved in Maynard v. Cartwright), the decision does not conflict with decisions in the Ninth Circuit or within other circuits, and the decision correctly acknowledged and evaluated State law. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted

SUSAN A. KETTLEWELL,
Pima County Public Defender

Donald S. Klein

*DONALD S. KLEIN
FRANK P. LETO

Deputy Public Defenders
PIMA COUNTY PUBLIC DEFENDER'S OFFICE
32 N. Stone, Fourth Floor
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(602) 740-5300

ATTORNEYS FOR RESPONDENT
*Counsel of Record

STATE OF ARIZONA)
) ss.
County of Pima)

DONALD S. KLEIN, a member of the bar of this Court, being duly sworn upon oath, deposes and says: that he served three (3) copies of the Response to Petition for Writ upon

Gerald R. Grant
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, AZ 85007

by depositing the same in the United State's mail, with first class postage prepaid.

DATED this 30th day of August, 1989.

Donald S. Klein
DONALD S. KLEIN
Attorney for Respondent

SUBSCRIBED AND SWORN TO BEFORE me this 30th day of August, 1989, by DONALD S. KLEIN.

NOTARY PUBLIC

My Commission Expires:

My Commission Expires: 2, 1992